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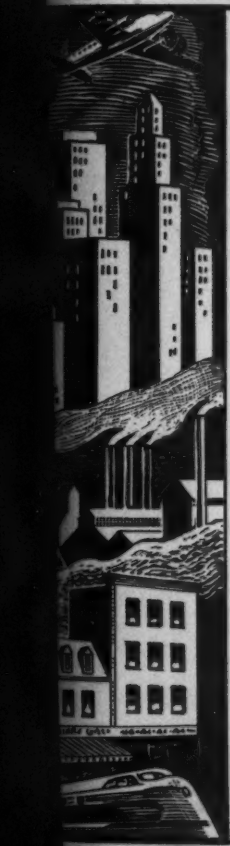

What Constitutes Doing Business in the Republic of the Philippines
Page 143

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Where corporate investment opportunity is accepted in part and rejected in part by directors, and rejected portion is then accepted by a director, stockholder may question the good faith rejection by directors. . . . *Page 145*

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Contents

What Constitutes Doing Business—The Republic of the Philippines 143

Recent Decisions

Connecticut—Defective organization—stockholder's liability..... 144

Delaware—Corporate investment opportunity—directors' good faith.. 145
—Source of preferred dividends..... 146
—Special appearance—limited liability sought..... 146

Illinois—Service of process—doing business..... 149
—Service of process—interstate commerce..... 149

Michigan—Retail sales tax—sales made on vessels..... 155

New Jersey—Service of process on truck driver..... 152

New York—Retail sales tax—carton containers..... 155
—Service of process—doing business..... 153
—Service of process—doing business..... 153

Ohio—Pre-emptive rights to subscribe to stock..... 147

Pennsylvania—Income tax—statutory apportionment..... 156

Tennessee—Service of process—doing business..... 154

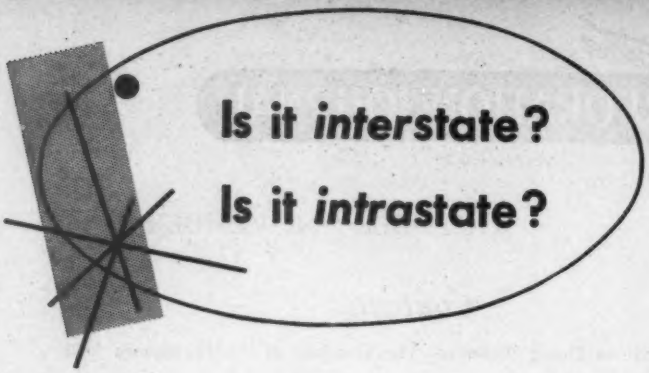
Utah—Non-assessable stock—amendment 148

State Legislation 157

Appealed to The Supreme Court..... 158

Regulations and Rulings..... 159

Some Important Matters for October and November..... 160



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what constitutes doing business

The Republic of the Philippines

THE PHILIPPINES became the independent Republic of the Philippines on July 4, 1946. The Constitution of the United States has in large part been employed as the model for the Constitution of the Philippines. While that Republic's jurisprudence is based in part upon Spanish law and partly upon the law of the United States, many of its statutes have been patterned after laws adopted in the United States. Opinions of the Supreme Court of the Philippines have frequently cited decisions of the state and federal courts of the United States.

The Corporation Law of the Philippines, which is Act No. 1459, has been referred to as "a sort of codification of American corporate law". (*Harden v. Benguet Consolidated Mining Co.*, 58 Philippine Reports 146.) Sections 68 and 69 of this law contain provisions that no foreign corporation "shall be permitted to transact business in the Philippines" or "maintain by itself or assignee any suit for the recovery of any debt claim or demand whatever", unless it has been licensed as a foreign corporation, under qualification procedure somewhat similar to that provided in most states of the Union.

There appears to be no statutory definition of the phrase "transact business". In a 1941 decision, the Supreme Court of the Philippines, after stating that no governing principle can be laid down as to what constitutes "doing" or "engaging in" or "transacting business" by a foreign corporation, observed:

> "The term implies a continuity of commercial dealings and arrangements and contemplates, to that extent, the performance of acts or the exercise of some of the functions normally incident to, and in progressive prosecution of the purpose and object of its organization."

In this case, the court held that the distribution and sale of the plaintiff corporation's products through an exclusive distributor, who was in effect its agent, was transacting business for the purpose of Section 69 of the Corporation Law. It was ruled that the company could not prosecute an action for violation of trade-mark and unfair competition. (*Mentholatum Co., Inc. v. Mangaliman*, 72 Philippine Reports 524.)

The available decisions involving these sections are few in number. These begin with two decisions rendered in 1907 in which the Supreme Court of the Philippines held that a foreign corporation which had not engaged in business there was not required to be registered as a foreign corporation in order to maintain suit. (*Dampfschieffs Rhederei Union v. La Compania Transatlantica*, 8 Philippine Reports 766; *Jonas Brook Bros. v. Froehlich & Kuttner*, 8 Philippine Reports 580.)

This highest court of the Philippines in 1909 laid down the rule that, under Section 69 of the Corporation Law, which denies unregistered foreign corporations the right to maintain suits for any debt, claim or demand, does

not impose on all plaintiff-litigants the burden of establishing by affirmative proof that they are not unregistered foreign corporations; also, that fact will not be presumed without some evidence tending to establish its existence. (*Spreckels et al. v. Ward et al.*, 12 Philippine Reports 414.)

It was indicated in a 1924 decision that the object of Section 68, which requires the qualification of foreign corporations before transacting business, was not to prevent a foreign corporation from performing single acts, but was to prevent it from acquiring a domicile for the purpose of business without taking the steps necessary to render it amenable to suit in the local courts. (*Marshall-Wells Co. v. Henry W. Elser & Co., Inc.*, 46 Philippine Reports 70.) (Followed in *Central Republic Bank & Trust Co. v. Bustamante*, (1941) 71 Phil. 359.)

In 1924, it was held that an unlicensed foreign corporation which had never done any business in the Philippines, but which was widely and favorably known through the use of products bearing its corporate and trade name, had a legal right to maintain an action to restrain residents and inhabitants from organizing a corporation bearing the same name, which was to deal in the same goods as those of the foreign corporation. (*Western Equipment & Supply Co. et al. v. Reyes et al.*, 51 Philippine Reports 115.

In conclusion, it would appear from the statutes and these decisions that (1) foreign corporations desiring to transact local business are required to secure a license for that purpose and may not transact business or prosecute suits unless they have obtained authority to do such business, and (2) no license or registration is necessary for foreign corporations to maintain suit unless such suit pertains to or is derived from acts which would amount to transacting business.

domestic corporations

CONNECTICUT

Where there was a defect in corporate organization, but parties in interest acted as a corporation for six years, court rules stockholder not to be liable as a partner for corporate debt.

The individual defendant was a stockholder in defendant bankrupt corporation, to which plaintiff had furnished flour, for which it sought to recover. It was contended that, due to defects in its organization, the corporate defendant was not such in fact and in law and was a partnership in which the individual defendant was a partner, and that he was liable as such for the debt in question.

It was alleged that, although the company was incorporated under the laws of Connecticut by certificate of in-

corporation approved May 6, 1947, by the Secretary of State, nevertheless the incorporators failed thereafter to file with that official a certificate of organization as required by the statute, which provides, in part, that unless such a certificate of organizaton is filed within two years after the filing of the certificate of incorporation, the certificate of incorporation shall be void. With this exception, and failure to file any annual report, the company, for six years, acted in all respects as a fully organized corporation. The individuals whose money was invested assumed and believed at all times that they were acting as a Connecticut corporation, lawfully. The Superior Court of Connecticut, Middlesex County, observed: "It thus appears that the association known as Kelly Bakery, Inc., actually existed for all practical purposes as a corporate body. It was a corporation in fact. It was authorized under our law to incur obligations as a corporation which would not bind those who associated to constitute it, in their individual capacities. It follows that this plaintiff did not, by reason of the defect in the organization procedure, acquire any rights against the stockholders and members of the corporation, to compel them to pay for the purchases of flour made by Kelly Bakery, Inc., from the plaintiff."

The Connecticut Flour Corporation v. Kelly Bakery, Inc. et al., 111 A. 2d 20. Irving E. Stroh of New Haven, for plaintiff. Sudarsky & Sudarsky of Hartford, and Richard Parmelee of Middletown, for defendants.

Defective organization-stockholder's liability.

DELAWARE

Where corporate investment opportunity is accepted in part and rejected in part by directors, and rejected portion is then accepted by a director, stockholder may question the good faith rejection by the directors.

Plaintiffs, executors of the estate of a stockholder, brought this derivative action against their corporation and directors, claiming that the president, also a director, with the collaboration of other directors, appropriated a valuable opportunity which should have been acquired for the corporate defendant.

At a time when the corporation was in a very liquid position and its management was looking for appropriate investment opportunities, an "opportunity" for such investment was brought to its president, who was the dominant director. Subsequently, the directors, with the president not voting, authorized the purchase of stock, which represented a portion of the "opportunity" for investment, and the president individually purchased certain patents and patent applications which represented the balance of the opportunity for investment. The transaction was set forth in a notice of the annual meeting of stockholders and this action was instituted shortly thereafter.

The Court of Chancery, New Castle County, after an examination of the circumstances, concluded that the defendants failed to sustain the burden of showing a good faith rejection of the offer as to the patents and patent applications, and that there was an improper diversion of an opportunity belonging to the corporation.

Greene et al., executors, v. Allen et al., 114 A. 2d 916. Robert C. Barab of Wilmington and Milton Paulson and Paul Roberts of New York City, for plaintiffs. Henry M. Canby and Louis J. Finger of Richards, Layton and Finger of Wilmington and Cyrus R. Vance of New York City, for defendants.

Payment of preferred dividends from current net earnings ruled lawful under circumstances where there was a capital deficit in respect to common stock.

In *Weinberg v. Baltimore Brick Company et al.*, 108 A. 2d 81, (The Corporation Journal, December 1954—January 1955, page 45), the Court of Chancery, New Castle County, refused to enjoin payment of dividends on cumulative preferred stock under circumstances where plaintiff common shareholder conceded earnings were sufficient for current preferred dividends and the capital assets as sufficient to pay preferred stockholders in full on distribution of assets.

In affirming this judgment, the Supreme Court of Delaware had occasion to determine whether the charter of the corporation, which provided for the payment of preferred dividends out of the net earnings of the company, contained a restriction preventing the company from declaring preferred dividends out of current net earnings while there was a capital deficit in respect of the common stock. The court concluded that the words "net earnings" in the charter did not restrict the source of the preferred dividends to earned surplus, and ruled that payment from current net earnings was lawful.

Weinberg v. Baltimore Brick Company et al., 114 A. 2d 812. Arthur G. Logan and Aubrey B. Lank of Logan, Marvel, Boggs & Thiesen of Wilmington (T. Muncy Keith and Leighton S. Dorsey of Wilmington, and Ralph Walter and Lawrence I. Weisman of Baltimore, Md., of counsel, for appellants. Henry M. Canby of Richards, Layton & Finger of Wilmington, and William Marbury of Piper & Marbury of Baltimore, Md., for appellees.

Non-resident defendants not amenable to personal service, whose stock was seized by sequestrator, denied leave to appear in Chancery Court to contest plaintiff's claim and to limit liability to value of property seized.

Plaintiff, a Delaware corporation, charged that one of the defendants, while one of its directors, violated his fiduciary duty to plaintiff by secretly sharing in profits realized through the purchase of real estate from plaintiff's wholly owned subsidiary. This defendant's wife, the other defendant, was charged with conspiring with her husband in the alleged breach of his fiduciary duty to plaintiff, which sought an accounting. Defendants being residents of Florida, and not amenable to personal service in Delaware, were ordered to appear and were served as provided for in Section 366 of Title 10, Delaware Code. Stock held by defendants in plaintiff corporation was seized by a sequestrator. Defendants did not enter a general appearance or file a motion

under Rule 12 attacking the jurisdiction. Rather, they sought leave to appear for the purpose of contesting plaintiff's claim, asking that their liability, if any, be limited to the value of the property seized by the sequestrator.

The Court of Chancery, New Castle County, observed that there was no precedent in the Chancery Court for the type of appearance defendants wished to make, although there was a Delaware suit at law, in which property of the defendants was attached, where the defendants sought leave to appear on the same limited basis on which the present defendants desired to litigate. In that case, the application was denied, the court holding that under the statute only two types of appearance may be made, a special appearance to raise jurisdictional objections and a general appearance constituting a submission to the court.

Stating the question as one whether Section 366 offers "a middle way, permitting a defendant whose property is attached to contest the merits of plaintiff's claim, and if unsuccessful, to have liability limited to the value of the seized property," the court reviewed decisions in Delaware and other states and in the federal courts. The court concluded: "In view of the unambiguous language of Section 366 and the manner in which it has been interpreted and applied by this court with the approval of the Supreme Court of Delaware, I am unable to find any basis for the type of appearance here sought to be made by defendant."

Leftcourt Realty Corporation v. Sands et al. 113 A. 2d 428. Richard F. Corroon of Berl, Potter & Anderson of Wilmington and Charles L. MacDonald of Lewis & MacDonald of New York, N. Y., for plaintiff. H. James Conaway, Jr., of Morris, James, Hitchens & Williams of Wilmington and Manuel Maxwell of New York, N. Y., for defendants.

OHIO

Corporation, accepting subscriptions to additional stock from stockholders and others without complying with statute providing for pre-emptive rights of stockholders, ruled not authorized to cancel such additional shares, or portion not subject to pre-emptive rights, without reimbursing subscribers.

In accordance with a resolution of the board of directors of defendant company, plaintiffs, not all of whom were then stockholders, subscribed for and were issued a total of 370 shares of stock. Subsequently, the board adopted a resolution providing that all the shares issued pursuant to the prior resolution, including those owned by the plaintiffs, be cancelled. The plaintiffs were so notified. They instituted suit, seeking to set aside the cancellation and to restrain the holding of a special meeting of the stockholders called to give such shareholders as desired to exercise their pre-emptive rights to purchase additional stock in the proportion owned by them previous to the resolution first mentioned.

The Supreme Court of Ohio referred to Section 8623-35 governing pre-emptive rights and observed that any right or title of plaintiffs to the shares in question was acquired by them subject

to the pre-emptive rights of other shareholders provided for by Section 8623-35, General Code. The court said: "To the extent that the exercise of pre-emptive rights by other shareholders may lawfully result in the taking from the plaintiffs of shares issued to them in December, 1952, defendant corporation should not be prevented from requiring plaintiffs to surrender such shares to defendant corporation for re-issuance to those other shareholders. Of course, no such surrender of shares can be required unless plaintiffs have been or are reimbursed, for amounts paid to defendant corporation for the shares so surrendered." As to the act of cancelling stock under such circumstances, the court remarked: "The mere fact, that a corporation has sold shares of its authorized and unissued stock which are subject to the pre-emptive rights of shareholders provided for by Section 8623-35, General Code, without offering those shares to shareholders in accordance with the provisions of that statute, will not justify the corporation in cancelling, without reference to valid subscriptions of shareholders therefor, any of the shares so sold."

To the extent that some of the plaintiffs had pre-emptive rights to subscribe to a prorata portion of the shares issued to them, the court indicated that "their title and right to some of the shares issued to them in December, 1952 may now be fully vested in them and not subject to pre-emptive rights of other shareholders."

Barsan et al. v. The Pioneer Savings & Loan Co. et al., 127 N. E. 2d 614. Roth & Pollack, Mooney, Hahn, Loeser, Keough & Freedheim, John Ladd Dean and Alan S. Geisner of Cleveland, for appellants. A. L. Kearns, A. R. Roman and Daird Perris of Cleveland, for appellees.

UTAH

Non-assessable stock can be made assessable by proper amendment of charter, by vote of majority of stock.

The lower court had ruled that non-assessable stock might become assessable if the articles of incorporation were amended by vote of a majority of the stock. Upon appeal to the Supreme Court of Utah, this judgment was affirmed. The court noted that the articles provided for amendments in any manner or "respect conformable to the laws", and that Title 16-2-45, U.C.A. 1953 generally allows for amendments of the articles so long as personal liability of the shareholders is not changed. The court observed: "Plaintiff's contention that making non-assessable stock assessable violates Article 1, Section 10 of the U. S. Constitution which prohibits a *state* from enacting legislation impairing the obligation of contracts, cannot be considered as well taken, since such interdiction applies only to legislative, not judicial or corporate action."

Fenton v. Peery Land and Livestock Co. et al., 280 P. 2d 452. Patrick H. Fenton of Cedar City, for appellant. Thomas & Armstrong of Salt Lake City, for respondents.

foreign corporations

ILLINOIS

Federal court in Illinois dismisses action against foreign corporation soliciting orders in state.

The plaintiff, an Illinois corporation, sought an injunction against the defendant, a Wisconsin corporation not licensed to do business in Illinois. The defendant's motion to dismiss the action because of lack of proper venue had been denied by a United States District Court in Illinois and an appeal was taken to the United States Court of Appeals, Seventh Circuit.

The Wisconsin corporation had its main office and principal place of business in Wisconsin, but it maintained a sales office in Chicago. The individual in charge of that office, upon whom service had been made, solicited orders for defendant's goods which were accepted or rejected by the defendant at its office in Wisconsin. He also consulted with architectural and engineering firms as to technical requirements for doors manufactured by defendant and he occasionally investigated complaints in Illinois. The defendant's name was on the door of its Chicago office and in the building directory and in the Chicago directory. The corporation did not maintain a stock of goods or a bank account in Illinois.

The court noted that in diversity of citizenship cases the law of Illinois must control and that the Illinois Supreme Court had established the rule "that a defendant is not subject to process in Illinois if it was not engaged in business in that state in any way other than the solicitation of orders to be accepted or rejected elsewhere". Applying the law of Illinois, the court concluded that the defendant was not doing business in Illinois and, therefore, not present in the state when the action was commenced, so as to be subject to service of process.

Riverbank Laboratories v. Hardwood Products Corporation, 220 F. 2d 465. David A. Fox of Milwaukee, Wis., Gerrit P. Groen, and Wilkinson, Huxley, Byron, Hume of Chicago, Ill., for defendant-appellant. Jack H. Oppenheim, William J. Friedman and Maurice Rosenfield of Chicago, for plaintiff-appellee.

Solicitation of orders in state, approved in another state, followed by shipment of goods to customers in state, ruled not to subject unlicensed seller corporation to service of process.

Defendant Massachusetts corporation, not licensed in Illinois, moved to quash service of process effected upon an employee of its sales representative in Illinois, who maintained an office for the company in Chicago. This office

FOR THE LITTLE ONES

Sales problems . . . production problems . . . delivery problems . . . collections . . . servicing . . . competition . . . inventories . . . personnel . . . they seem to be problems enough for the officers of a small corporation to tackle. But there is another, underlying all the others.

It is the problem of protecting the corporation's most important possession: *its right to do business as a corporation.*

A fat, profitable contract may be worth no more than the paper on which it is written if the corporation, having overlooked some state tax requirement loses its license — and its authority to enter into such a contract.

Also, for the small corporation just beginning — or just breaking out into the open — a mishandled service of process can be disastrous.

Lawyers recognize that problem. Many lawyers do something about it — and insist their small (as well as their large) corporation clients use the C T System of Corporate Protection. Of the thousands and thousands of corporations using the C T System — each through its own lawyer — the great preponderance are qualified in only one or two states.

was leased to the company which reimbursed itself for the rent by deducting it from the commissions earned by its representative. Orders obtained were forwarded to the defendant in Massachusetts and were there accepted or rejected. If accepted, shipments were made f.o.b. factory in Massachusetts. Defendant's name was listed in the Chicago telephone directories.

The United States Court of Appeals, Seventh Circuit, affirmed a judgment of the District Court, dismissing the suit. Referring to decisions of the Illinois state courts applied to like situations, the court remarked: "They establish a settled rule that a foreign corporation will not be deemed to be doing business in the state if its activities are limited entirely to the solicitation of purchase orders which are acted upon only in another state. We have no right to extend or modify the doctrine as it is defined by the courts of Illinois. However, it may not be amiss to observe that federal cases have quite generally followed the same reasoning." The court concluded "that under the law of Illinois, defendant was not doing business in Illinois within the meaning of the Illinois statutes, and, therefore, was not amenable to service of process."

Roberts v. Evans Case Co., 218 F. 2d 893. Arthur S. Gomberg and Samuel Nineberg of Chicago for appellant. Harry L. Kinser, T. I. McNight, McNight, McLaughlin & Dunn of Chicago, for appellee.

NEW JERSEY

Service upon defendant's truck driver, who delivered newspapers in the state, held to be effective service.

The plaintiff brought an action against the defendant foreign corporation by serving its truck driver, who delivered newspapers in New Jersey and who disposed of any unsold merchandise for cash which he returned to the defendant in New York. The individual served did not represent the defendant in any general capacity and he had no connection whatsoever with the transaction out of which the cause of action arose.

The sole question before the Superior Court of New Jersey, Law Division, was whether or not service had been made upon "any servant of the corporation within this State acting in the discharge of his duties" within the purview of R.R. 4:4-4 (d). The court held that the service was effective and remarked that in the absence of specific regulatory limitations the words "any servant" should be given their literal meaning, otherwise difficulties would be generated by judicial interpretation and restriction. "The rule is fashioned", the court continued, "to meet current business exigencies requiring unrestricted access of the process server to corporate entities".

Wright v. News Syndicate Co., Inc., 113 A. 2d 215. Harry Green, of Little Silver, for plaintiff. Katzenbach, Gildea & Rudner (George Gildea appearing), of Trenton, for defendant.

NEW YORK

Service upon foreign corporation upheld where effected by serving president of resident corporation alleged to be its managing agent.

In an action against a foreign corporation and a resident corporation, the defendant foreign corporation moved for an order to confirm a referee's finding that the resident corporation was not its managing agent and to set aside the finding that it was subject to service of process. Service upon the foreign corporation had been effected by serving its alleged managing agent, the resident corporation, by serving its president.

The two defendants had entered into an "Export Sales Agreement" whereby the resident corporation was the exclusive representative of the foreign corporation in soliciting and developing its foreign business, and was authorized to appoint sub-agents in various countries towards that end. The foreign corporation advertised its products under the legend "Export office" giving the resident corporation's address, whose letterhead and outer door carried the inscription of "Export Managers" for the foreign corporation. The telephone directory listed the same phone number for both defendants and the post office was advised that the defendants maintained the same address.

The Supreme Court, Special Term, N. Y. County, confirming the referee's finding, ruled that the defendant foreign corporation "conducted a substantial part of its business, and therefore was present, within the State of New York for the purpose of effecting service of process upon it". Regarding the question of whether the resident corporation was the managing agent of the foreign corporation, the court noted that "the test is whether the person served is so related to the defendant served that it may be justly inferred that the defendant will have notice of the action". The court, disaffirming the referee's finding, held that where the resident corporation through its president was in constant communication with the foreign corporation and where the former and its president were vested with unlimited discretion in regard to sales within the territory assigned to them, the resident corporation was the managing agent of the foreign corporation.

Ameritex Development Corp. v. Brown and Sites Co., Inc., et al., 135 N. Y. S. 2d 478. Becker & Martin (Emanuel Becker, of counsel), of New York City, for plaintiff. Debevoise, Plimpton & McLean, for defendant Brown & Sites. Willkie, Owen, Farr, Gallagher & Walton (Mark F. Hughes, Vincent R. Fitzpatrick, of counsel), of New York City, for defendant Davenport Besler Corporation.

Foreign corporation, acting through commission broker, held to be doing business and subject to jurisdiction of Federal court.

One of the defendants, a Pennsylvania corporation, in an action to recover for personal injuries, moved in the United States District Court, S. D., New York, to dismiss the action against it on the grounds that it was not subject to service of process in the Federal jurisdiction and that it had not been served with process. The defendant corporation did not maintain offices or plants

in New York but it sold its products through an independent commission broker who received compensation in the form of commission. It knew and consented to the fact that the commission broker held himself out as the source through which the defendant's products could be purchased.

The court ruled that the defendant was doing business in the district and that its continuous and long continued activities in the district by which its products were sold through the commission broker justified its being served in the district, even though the suit was not based on a transaction which occurred in the district.

Process in this matter was served on the office manager of the commission broker. Regarding the validity of the manner of service, the court observed that it is well settled that service on the agent whose activities established the defendant as doing business in the district was sufficient service on the foreign corporation.

Satterfield v. Lehigh Valley Railroad Co., 128 F. Supp. 669. Baker, Garber & Chazen, Milton Garber of counsel, of Hoboken, for plaintiff. Shearman & Sterling & Wright, of New York City, for defendants, H. E. Millard Lime & Stone Co., appearing specially herein, C. Brent Holleran of New York City, of counsel.

TENNESSEE

Foreign corporation, whose employees rendered certain services in state, ruled subject to service of process.

The defendant foreign corporation, not licensed in Tennessee, moved to dismiss the action against it and to quash the return of service of summons on the grounds that it was not subject to service within the Eastern District of Tennessee and that it was not properly served. The original service was made upon the Secretary of State of Tennessee and, upon removal of the case to the United States District Court from the county court, an alias summons was served on the defendant's "automotive trade salesman". The court took note that oral testimony given by three of the defendant's employees showed clearly that the corporation carried on business activities in Tennessee continuously for a period of five years and that such activities included more than solicitation of orders. The defendant's employees in the state checked the stocks of distributors in the state, gave instructions as to the use of its products, investigated complaints, serviced delinquent accounts and held sales meetings in the state.

In denying the defendant's motion to dismiss the suit, the court ruled that, from the federal viewpoint, the business carried on by the corporation within Tennessee supplied more than the minimum contacts therein required to maintain the suit.

Radford v. Minnesota Mining & Manufacturing Company, 128 F. Supp. 775. Clyde W. Key, Wm. A. Reynolds, of Knoxville, for plaintiff. H. H. Campbell, Jr., of Knoxville, for defendant.

taxation

MICHIGAN

Sales of tangible property made on passenger vessels plying between Michigan and points in Ohio, Canada and New York, determined by allocation related to time spent in Michigan waters, ruled subject to Michigan sales tax.

Appellant navigation company sought to recover sales taxes paid on food and other articles sold on passenger vessels traveling between Detroit and points in Ohio, Canada and New York. The tax base was arrived at through the use of a percentage representing the proportion of time the vessels were in Michigan waters.

The Michigan Supreme Court noted that the Michigan sales tax is a tax imposed upon the seller for the privilege of making retail sales within the State of Michigan and is measured by the gross proceeds of such sales. "The primary inquiry," said the court, "concerns the relationship of the transaction taxed to interstate commerce, or in this case, whether the sale of tangibles on a steamship traveling in interstate or foreign commerce is a sufficiently 'local' activity, apart from the transportation of passengers, to be subject to taxation." Observing that the sales tax applied only to those sales "within the State," and that the formula utilized purported to reach only such sales, the court stressed that the sales reached were those made in Michigan .waters in the presence of both buyer and seller. The court concluded that such sales made in Michigan on plaintiff's ships were subject to the Michigan sales tax.

*Detroit and Cleveland Navigation Co. v. Department of Revenue,** 69 N. W. 2d 832. Dyer, Angell & Meek (Willis C. Bullard and Lewis M. Slater, of counsel), of Detroit, for appellant. Thomas M. Kavanagh, Attorney General, Edmund E. Shepherd, Solicitor General, and T. Carl Holbrook, Maurice Barbour and William D. Dexter, Assistants Attorney General, of Lansing, for appellee.

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* The full text of this opinion is printed in the **State Tax Reporter,** Michigan, page 10,317.

NEW YORK

Corporation shipping products to retailers in cardboard cartons used to facilitate sales and not for resale by the retailers, held liable for New York City sales tax on cartons.

The petitioner's business consisted of manufacturing, packing and selling soaps and toilet articles which were sold in bulk principally to wholesalers, jobbers, retail grocers and retail druggists. The issue before the Court of

Appeals of New York was whether the petitioner could be held liable as a retail vendor or as a retail purchaser for the New York City sales tax upon the corrugated cardboard cartons in which it shipped its products to retail grocers and druggists in New York City. The court stated that no question of the use tax was involved.

The Appellate Division had annulled the New York City Comptroller's determination that the petitioner should have paid the sales tax upon the sales of cartons made by it to customers. It held the view that the petitioner itself was the consumer of the cartons. The appeal was taken from this ruling.

The Court of Appeals ruled that the cartons were not an integral part of and inseparable from their contents, but that the cartons were used only to facilitate the sale of the product packed in the container and were not for the purpose of a resale of the container as an article of commerce. It held that sales by the petitioner to its customers were sales at retail and that the petitioner was not protected by any resale certificates it had obtained. The order of the Appellate Division was reversed.

Colgate-Palmolive-Peet Company v. Joseph,* 125 N. E. 2d 857. Leo A. Larkin, Acting Corporation Counsel, (Stanley Buchsbaum, Seymour B. Quel and Leroy Mandle, of counsel) of New York City, for appellant. Sol Charles Levine, S. H. Levine and Joseph M. Goodman of New York City, for respondent.

* The full text of this opinion is printed in the **State Tax Reporter**, New York, page 28,231.

PENNSYLVANIA

State Supreme Court affirms judgment upholding use of statutory income tax apportionment formula where multiform activities were carried on.

In *Commonwealth of Pennsylvania v. American Telephone & Telegraph Co.*, decided by the Court of Common Pleas, Dauphin County, August 19, 1954, (The Corporation Journal, December, 1954—January, 1955, page 56), it was held that the fiscal officers of the state, when administering the corporate net income tax, were without authority, on their own initiative, to base the tax on segregated income, as an alternative to the use of the statutory apportionment formula.

Upon appeal, this judgment has been affirmed by the Pennsylvania Supreme Court, which observed: "It is clear that the Corporate Net Income Tax Act neither expressly or impliedly provides for a computation of the tax on any other than a unitary basis, making no differentiation in the case of corporations carrying on multiform activities."

Commonwealth of Pennsylvania v. American Telephone & Telegraph Co.,* 115 A. 2d 373. George W. Keitel, Herbert B. Cohen, Ralph S. Snyder, Deputy Attys. General, for appellant. Roy J. Keefer, Leon D. Metzger, William H. Wood of Harrisburg, for appellee; Martin J. Karl and J. Randolph Coleman, Jr., of New York City, of counsel.

* The full text of this opinion is printed in the **State Tax Reporter**, Pennsylvania, page 11,558.

state legislation

Alabama — Chapter 83 effects amendments specifically providing for the merger of a foreign corporation into a domestic corporation, or the merger of a domestic company into a foreign corporation. It also provides for the consolidation of a domestic and a foreign corporation to form a new domestic corporation or a new foreign corporation.

Arkansas — Act No. 83 permits the by-laws of an Arkansas corporation to provide that a director may, by a writing signed by him, designate a proxy to cast his vote at any regular, special, adjourned or called meeting of the board of directors of the corporation. The proxy would be a person who would himself be eligible for election as a director. He may be a director, but a director of the corporation may not be designated as proxy for more than one director.

California — Chapter 671 increases from 30 to 50 days the period prior to a shareholders' meeting during which the directors may fix a record date. The date so fixed may be used to determine who the shareholders are for the purpose of notice, voting rights, dividends, etc.

Hawaii — House Bill 1208 repeals the provision that the registration of a foreign corporation may be cancelled if the corporation fails for a period of two years to file an annual exhibit.

Iowa — House Bill No. 160 amends Section 499.54, relating to admission fees of foreign cooperative corporations, by requiring such cooperative corporations to pay the same admission fees as regular foreign business corporations.

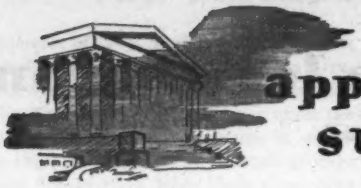
Kansas — House Bill 367 contains provision that the application to do business filed by foreign corporations and the consent to service of process may be signed by the president or vice-president, secretary or assistant secretary.

Maine — Chapter 224 adds a provision that foreign charitable corporations shall be exempt from payment of any fees payable by foreign corporations.

Massachusetts — Chapter 173 provides that a domestic corporation may include provision in its charter giving stockholders the right of cumulative voting when electing directors.

North Carolina — Senate Bill 545 enlarges the jurisdiction of the state courts over unlicensed foreign corporations doing business in the state, containing a provision that, under certain circumstances, a foreign corporation subject to suit may appoint and maintain a registered agent in the state even though the corporation is not doing business therein.

Ohio — House Bill 70, effective October 8, 1955, provides for the revision, codification and renumbering of the general laws relating to corporations. The new law contains a complete chapter relating solely to non-profit corporations.



appealed to the supreme court

The following cases previously digested in The Corporation Journal have been appealed to The Supreme Court of the United States.*

NEW JERSEY. Docket No. 63. *Werner Machine Co. v. Director, Division of Taxation*, 107 A. 2d 36, affirmed 110 A. 2d 89. (The Corporation Journal, December 1954—January 1955, page 55.) Franchise tax—inclusion of Federal tax-exempt bonds in basis. **Appeal filed, May 9, 1955.**

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* Data compiled from **CCH U. S. Supreme Court Bulletin, 1955–1956.**

Extending Corporate Activities into New States

Counsel for corporations planning, near the close of the year, to extend their activities into new states, in which qualification is contemplated, usually give careful consideration to the dates on which qualification is to be effected. It has been found, in many instances, that if qualification and the carrying on of intrastate activities, are deferred until after January 1, there may be savings of taxes which would otherwise be due early in the new year. Also, the preparation and filing of certain tax returns, due early in the new year if qualification and business activities occur prior to January 1, may be postponed for approximately a year, if these steps are delayed until after the new year begins.

regulations and rulings

General — Where it is desired to effect, before the end of the calendar year, either the withdrawal of a foreign corporation from a state in which it had been authorized to do business or the dissolution of a domestic corporation, counsel have usually found that it is advisable to initiate the dissolution or withdrawal proceedings in most states as early as possible. Thus, if there are time-consuming requirements with which compliance must be had, ample provision may be made to satisfy such requirements before the end of the year. Frequently such requirements call for the preparation of income and other tax reports, the auditing of the corporate books, or the obtaining of certificates from various state departments that all taxes due the state have been paid. Inasmuch as, in some instances, a month or more may be consumed in effecting such compliance, it is advisable to investigate and institute dissolution or withdrawal proceedings, wherever possible, well in advance of the close of the year.

Idaho — New or used automobiles on hand or acquired after January 1 of any year by dealers for sale or exchange, which are subequently registered in the state, should be removed from the assessment rolls if proof of exemption is given to the assessor in time. Thus they are exempt from the personal property ad valorem tax. (Opinion of the Attorney General, State Tax Reporter, Idaho, ¶ 51-003.)

Kentucky — A foreign corporation assigning sales representatives to Kentucky to solicit orders, with deliveries made from out of state direct to the consumer, is not doing business so as to be required to qualify as a foreign corporation. (Opinion of the Attorney General, State Tax Reporter, Kentucky, ¶ 2-012.)

Missouri — A promissory note owned by a domestic corporation, executed by a foreign corporation at its out-of-state office and deposited with an out-of-state depositary is an asset subject to the Missouri franchise tax. The domestic corporation has not invested its money in the foreign corporation; it has merely loaned money to the corporation. The mere lending of money does not constitute employment of a part of the outstanding shares in business in another state. (Opinion of the Attorney General, State Tax Reporter, Missouri, ¶ 200-113.)

Nevada — Unlicensed foreign finance corporations acting in conjunction with domestic lenders have the following powers and limitations under Chapter 228, Laws of 1955: (1) not required to file articles; (2) not required to publish or advise assessors of last year's business; (3) not required to incorporate as banks or trust companies; (4) not permitted to serve as executors, administrators, etc.; (5) not required to obtain license from the Superintendent of Banks; (6) permitted to institute and defend suits; (7) must file list of officers and directors and pay fee as a condition precedent; (8) must file list of officers and directors on or before June 30th thereafter and pay statutory fee. (Opinion of the Attorney General to the Secretary of State, State Tax Reporter, ¶ 200-038.)

some important matters

For October and Novembe

This Calendar does not purport to be a *complete* calendar of all matters requiring attention by corporations in any given state. It is a condensed calendar of the more important requirements covered by the *State Report and Tax Bulletins* of The Corporation Trust Company. Attorneys interested in being furnished with timely and complete information regarding *all* state requirements in any one or more states, including information regarding forms, practices and rulings, may obtain details from any office of The Corporation Trust Company or C T Corporation System.

Arizona — Quarterly Withholding Tax due on or before October 31.

California — Quarterly Retail Sales Tax due on or before October 31.

Colorado — Quarterly Withholding Tax due on or before October 31.

Connecticut — Quarterly Retail Sales Tax due on or before October 31.

Delaware — Withholding at source Returns due October 31.—Domestic and Foreign Corporations paying compensation to Delaware employees.

Georgia — Certified Statement for Registration due on or before November 1.—Domestic and Foreign Corporations.

Indiana — Quarterly Gross Income Tax due on or before October 31.—Domestic and Foreign Corporations.

Iowa — Quarterly Retail Sales Tax due on or before October 31.

Kentucky — Quarterly Withholding Tax due on or before October 31.

Maryland — Quarterly Withholding Tax due on or before October 31.

Missouri — Quarterly Retail Sales Tax due on or before October 15.—Domestic and Foreign Corporations.

New York — Second Instalment of Franchise (Income) Tax of Business Corporations due on or before November 15.—Domestic and Foreign Business Corporations other than real estate companies.

North Dakota — Quarterly Retail Sales Tax due on or before October 31.—Domestic and Foreign Corporations.

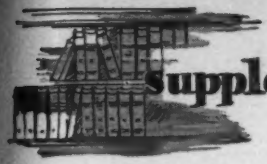
Oregon — Quarterly Withholding Tax due on or before October 31.

Rhode Island — Semi-Annual Report to Division of Industrial Inspection during October and April.—Domestic and Foreign Corporations employing five or more persons in Rhode Island.

South Dakota — Quarterly Retail Sales Tax due on or before October 15.—Domestic and Foreign Corporations.

Utah — Quarterly Retail Sales Tax due on or before October 30.—Domestic and Foreign Corporations.

West Virginia — Quarterly Business (Gross Sales) Tax due on or before October 30.—Domestic and Foreign Corporations.



supplementary literature

In connection with its various activities The Corporation Trust Company publishes the following supplemental pamphlets, any of which will be sent without charge to readers of The Journal. Address The Corporation Trust Company, 120 Broadway, New York 5, N. Y.

Corporate Tightrope Walking. A look at recent developments which affect corporations carrying on business in interstate commerce.

Agent for Process. Case histories of corporation officials who suddenly found out that trouble can take funny bounces when statutory representation is entrusted to a business employee.

A Pretty Penny . . . Gone! The troubles that descend upon a corporation—as shown by actual court cases—if its agent cannot be found when service of process is attempted.

Before and After Qualification. A complete list of aids and services—including those supplied without charge—which CT furnishes for lawyers working on foreign corporation matters.

Corporate Confusion. A discussion of the wriggling, twisting, seemingly opposite court decisions which make building a pattern for out-of-state operations by a corporation a risky business these days.

Suppose the Corporation's Charter Didn't Fit! Shows how charter provisions which suit well enough at time of organization may be handicaps for the corporation in later life—some measures to avoid them that a lawyer may help his client to take.

Some Contracts Have False Teeth. Interesting case-histories showing advisability of getting lawyer's advice before contracting for work outside home state, even for federal government.

More Sales with Spot Stocks. Advantages found by many manufacturers in carrying spot stocks at strategic shipping points—and preliminary statutory measures necessary to protect corporate status.

When a Corporation Is P. W. O. L. A simple explanation of the reasons for and purposes of the foreign corporation laws of the various states, and illustrations of when and how a corporation makes itself amenable to them. Of interest both to attorneys and to corporation officials.

What Constitutes Doing Business (1951 Edition). A 192-page book containing brief digests of decisions selected from those in the various states as indicating what is construed in each state as "doing business."

THE CORPORATION TRUST COMPANY
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Form 3547 requested

The CORPORATION JOURNAL

The Corporation Journal is published by The Corporation Trust Company bi-monthly, February, April, June, August, October and December. Its purpose is to provide, in systematic and convenient form, brief digests of significant current decisions of the courts, and the more important regulations, rulings or opinions of official bodies, which have a bearing on the organization, maintenance, conduct, regulation, or taxation of business corporations. It will be mailed regularly, postpaid and without charge, to lawyers, accountants, corporation officials, and others interested in corporation matters, upon written request to any of the company's offices.

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